RECENT CASES

Civil Procedure—

SUIT TO IMPOSE A CONSTRUCTIVE TRUST ON LAND HELD A TRANSITORY ACTION

Plaintiff corporation brought suit in the federal court for the northern district of California against former employees alleging that while the defendants were in control of the corporation they conveyed to themselves large landholdings owned by the corporation. Plaintiff sought to impress a constructive trust upon this property. Defendants moved to have the action dismissed or transferred to the southern district where the lands in question were located,[1] contending that a suit to impose a constructive trust is in fact a means of testing the ownership of land, and thus is a local action which must be brought in the district where the land is situated. The defendants further argued that section 1655 of the Judiciary Act[2] requires all actions to impose a constructive trust on land to be brought in the district where the land is located. The court rejected both of these arguments, holding that the action was not local in nature, and that the venue requirements of section 1655 are only applicable when the plaintiff is using that section to obtain constructive service of process. *Miller & Lux, Inc. v. Nickel,* 149 F. Supp. 463 (N.D. Cal. 1957).

In the federal courts, when jurisdiction is based on diversity of citizenship, venue of a transitory action normally lies in the place where all the plaintiffs or all the defendants reside.[3] Section 1392(b) of the Judiciary Act provides that "any civil action, of a local[4] nature, involving property located in different districts in the same State, may be brought in any of such districts."[5] The courts have held that this section, by implication, requires that in a local action involving only one district, the action may be brought only within that district.[6] If an action involves the naked

1. 28 U.S.C. § 1406 (1952) provides: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or . . . transfer such case to any district or division in which it could have been brought."

2. 28 U.S.C. § 1655 (1952).

3. 28 U.S.C. § 1391 (1952).

4. See Casey v. Adams, 102 U.S. 66 (1880). "Local actions are in the nature of suits in rem, and are to be prosecuted where the thing on which they are founded is situated." *Id.* at 68. Some courts define local actions as those which could have arisen only in a particular place and transitory actions as those which could have arisen anywhere. Others state that where the effect of the judgment cannot be had if it is laid in the wrong place then the action is local, all other actions being transitory. Note, 70 HARV. L. REV. 708, 711 (1957).

5. 28 U.S.C. § 1392(b) (1952).

6. Casey v. Adams, 102 U.S. 66 (1880); Eddington v. Texas & N.O.R.R., 83 F. Supp. 230 (S.D. Tex. 1949); 3 MOORE, FEDERAL PRACTICE ¶ 19.04 (2d ed. 1948).

question of title to land, historically the action has been categorized as local, and therefore it must be brought in the district court where the land is located.[7] However, where an action contains a so-called "mixed question" involving both title to land and fraud, trust, or contract, the action has been characterized as transitory.[8] Some courts following the leading case of *Massie v. Watts*[9] have held that an attempt to impose a constructive trust on land is a mixed question and therefore is transitory.[10] Arguments based on section 1655 of the Judiciary Act have questioned the validity of these holdings. That section provides that when an action has been brought to

> "enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain." [11]

Although the primary function of this section is to permit plaintiffs to obtain jurisdiction over absent defendants by means of constructive service,[12] the courts have held that once jurisdiction has been obtained under this section a defendant may not contest venue.[13] Thus, by effectively limiting venue in cases brought under section 1655 to the local district, the section has come to have a secondary importance as a venue statute. Although most of the actions brought under this section are those commonly considered to be "local," [14] this section has often been used by parties seeking to impose a constructive trust on land.[15] Some authorities argue that, since only local actions can be brought within the scope of 1655 and since actions seeking to impose a constructive trust

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7. *Ibid.*

8. Massie v. Watts, 10 U.S. (6 Cranch) 148, 159 (1810). It is difficult to determine whether the term "local action" in this case referred to venue or jurisdiction. *Id.* at 157-58. See also Mandley v. Backer, 121 F.2d 875, 876 (D.C. Cir. 1941) (referring to "local" action as a classification of jurisdiction); Landell v. Northern Pac. Ry., 98 F. Supp. 479 (D.D.C. 1951); Blume, *Actions Quasi in Rem Under Section 1655,* 50 MICH. L. REV. 1, 15 (1951).

9. 10 U.S. (6 Cranch) 148 (1810).

10. See note 8 *supra.*

11. 28 U.S.C. § 1655 (1952).

12. See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 954, 955 (1953); Note, 70 HARV. L. REV. 708, 717 (1957).

13. *Ibid.*

14. Greeley v. Lowe, 155 U.S. 58 (1894); Proctor v. The Sagamore Big Game Club, 128 F. Supp. 885 (W.D. Pa. 1955); Consolidated Interstate Callahan Mining Co. v. Callahan Mining Co., 228 Fed. 528 (D. Idaho 1915). However, not all actions can be brought within the provisions of section 1655. See Ladew v. Tennessee Copper Co., 179 Fed. 245 (S.D. Tenn.), *aff'd,* 218 U.S. 357 (1910).

15. Seven Oaks, Inc. v. FHA, 171 F.2d 947 (4th Cir. 1948); Kelleam v. Maryland Cas. Co., 112 F.2d 940 (10th Cir. 1940), *rev'd on other grounds,* 312 U.S. 377 (1941); Porter v. Cooke, 63 F.2d 637 (5th Cir. 1933); Anderson v. Benson, 117 F. Supp. 765 (D. Neb. 1953); Robinson v. Seatex Oil Co., 57 F. Supp. 581 (N.D. Tex. 1944). See ROSE, FEDERAL JURISDICTION AND PROCEDURE 296-300 (4th ed. 1920).

have been permitted under this section, this type of action is necessarily local.[16] The defendants advanced this argument. If they were correct, section 1392 would require the instant suit, as a local action, to be brought in the southern district of California.[17] However, this argument failed to convince the court since the language of section 1655 includes actions involving both real and personal property, indicating that the object of the section was not to distinguish between local and transitory actions, but to permit constructive service of process in certain enumerated cases. As an alternative, defendants argued that, disregarding any attempt to label the instant action as "local" or "transitory," because of section 1655's aforementioned venue significance[18] an action seeking to impose a constructive trust must be brought within the district in which the land is situated. The court rejected this argument also, holding that since section 1655 is permissive in its language it does not establish the proper venue in those cases where the plaintiff did not bring the action under that section. Thus, the instant court found that it was not controlled either by precedent or by clear statutory language.[19]

Where the question of proper venue is not governed by precedent or statute it should not be decided merely by analogy to cases classically categorized as "local" or "transitory" since often those decisions were based on outmoded procedures and trial by jurors who were expected to decide cases on their personal knowledge of the facts.[20] Rather the venue which would best serve the interests of all concerned should be sought. It would seem that the instant court reached this result when it denied defendants' motion to dismiss the action or transfer it to the southern district. In actions such as ejectment and trespass it might well be important to have the trial in the district where the land is situated since the jury or court may need to view the land, the location of the property might be a decisive issue in the case, or it might be necessary for the

16. See Kelleam v. Maryland Cas. Co., 112 F.2d 940 (10th Cir. 1940), *rev'd on other grounds*, 312 U.S. 377 (1941) (implies that only actions which are "local" can be brought under section 1655); Blume, *Actions Quasi in Rem Under Section 1655*, 50 MICH. L. REV. 1, 15 (1951): "If an action to enforce a trust is a "local action" it has become so because it may be maintained as an action quasi in rem under section 1655."

17. See text at note 6 *supra*.

18. See text at note 13 *supra*.

19. There seems to be a split of authority on the application in the federal courts of state law regarding the distinctions between local and transitory actions. "In the federal cases in which the issue has been discussed it has generally been stated that the definition [of local actions] of the forum state is controlling." Note, 70 HARV. L. REV. 708, 710 (1947). See also Erwin v. Barrow, 217 F.2d 522 (10th Cir. 1954); Josevig-Kennecott Copper Co. v. James F. Howarth Co., 261 Fed. 576 (9th Cir. 1919); *cf. Ex parte* Schollenberger, 96 U.S. 369, 377 (1877). However, in reference to similar problems of venue, courts have determined that venue is a procedural problem and, thus, application of state law is inappropriate. See Shaffer v. Tepper, 127 F. Supp. 892, 893 (E.D. Ky. 1955); Davis v. Smith, 126 F. Supp. 497, 499 (E.D. Pa. 1954). The problem would seem to be moot in the instant case inasmuch as California law seems to be in accord with the result of this case. See Neet v. Holmes, 19 Cal. 2d 605, 122 P.2d 557 (1942).

20. See Note, 70 HARV. L. REV. 708, 717 (1957).

local sheriff to attach, deliver, or execute upon the property.[21] However, in an action to impose a constructive trust on land these factors are not of primary concern, the important questions being whether a fiduciary relationship existed[22] and whether defendants used their position for personal benefit.[23] Similarly, none of the other factors which might dictate a change of venue were present in the instant case. In actions involving land, venue might be shifted if the foreign court lacks power to enforce its judgment,[24] but here the court found that through its equity power it could compel the defendants to abide by its decree.[25] Also, venue might be shifted to avoid inconvenience to one of the parties,[26] but in the instant case the defendant did not show that there would be less expense or burden in defending the suit if it had been brought in the southern district. Finally, since all the defendants resided in the northern district their natural desire to have the case decided by a local forum was satisfied.[27]

Constitutional Law—

SEARCH AND SEIZURE BY FEDERAL OFFICERS OF NARCOTICS CONCEALED IN RECTUM OF SUSPECT HELD "REASONABLE" AND NOT A VIOLATION OF FOURTH AMENDMENT

Defendant was stopped at the international boundary line in California by customs officers.[1] He was asked to remove his coat, whereupon numerous puncture marks were revealed in the veins of his arms.[2] The in-

21. See Stevens, *Venue Statutes: Diagnosis and Proposed Cure,* 49 MICH. L. REV. 307 (1951).

22. See Amerada Petroleum Corp. v. Burline, 231 F.2d 862 (10th Cir. 1956), where the plaintiffs were unable to establish the fiduciary relationship necessary to impress a trust.

23. A constructive trust is imposed by a court of equity whenever a person clothed with a fiduciary duty gains some personal advantage by availing himself of his situation. Scott, *Contructive Trusts,* 71 L.Q. REV. 39, 47 (1955).

24. See Note, 70 HARV. L. REV. 708, 712 (1957).

25. See also 10 U.S. (6 Cranch) at 157-58; 28 U.S.C. § 1963 (Supp. V), (1958): "A judgment in an action for the recovery of money or property now or hereafter entered in any district court which has become final by appeal . . . may be registered in any other district by filing therein a certified copy of such judgment. A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner."

26. The convenience of the parties has been legislatively recognized. See 28 U.S.C. § 1404(a) (1952).

27 A litigant might feel that a "local" judge and jury would be more sympathetic to his claims than would be a body of persons unknown to him.

1. Search of persons, vehicles and vessels by customs inspectors is authorized by 49 STAT. 521 (1935), 19 U.S.C. § 1581 (1952); 46 STAT. 748 (1930), 19 U.S.C. § 1582 (1952); REV. STAT. § 3061 (1875), 19 U.S.C. § 482 (1952).

2. Defendant admitted to the officers that he was an occasional user of narcotics and that he was then on parole from a California state conviction for possession of marijuana.

spectors then directed defendant to disrobe entirely and, upon his so doing, noticed a large quantity of greasy substance about his rectum. Defendant admitted that he had heroin concealed in his rectum.[3] Thereafter, he was taken to the United States Naval Hospital where, despite his denial of concealment and resistance to the procedure, the heroin was forcibly removed by medical personnel. In a subsequent prosecution for illegal importation and concealment of heroin, defendant's motion to suppress the evidence thus obtained was denied. The circuit court affirmed, holding that the search and seizure did not constitute a violation of the fourth or fifth amendments.[4] *Blackford v. United States,* 247 F.2d 745 (9th Cir. 1957), *cert. denied,* 356 U.S. 914 (1958).

Although the fourth amendment prohibits unreasonable searches and seizures,[5] it does not preclude the use in a criminal trial of evidence obtained by such a search.[6] Nevertheless, the Supreme Court has declared that such evidence is inadmissible in the federal courts.[7] The federal exclusionary rule does not extend to state courts.[8] A state search and seizure in violation of the fourth amendment may be so outrageous, however, that the use of its fruits as evidence in a state prosecution violates due process. In *Rochin v. California*[9] the Supreme Court held that the conduct of state police officers in breaking into the upstairs room of a suspected dope addict, assaulting him and then pumping his stomach to recover morphine tablets which he had swallowed so "shocked the conscience" that the use of the morphine as evidence in a prosecution of the suspect violated due process. In *Irvine v. California*[10] the Court held that due process had not been violated when evidence was obtained for a state prosecution by placing a dictaphone in a suspected bookmaker's bedroom for the period of one month, although the procedure was termed "a flagrant violation of the fourth amendment."[11] The *Irvine* decision thus appears to limit the application of the *Rochin* doctrine to instances of brutality, coercion or violence to the person, as opposed to trespasses upon property and invasions of privacy. Not all invasions of the body are violations of due process, however. In the recent case of *Breithaupt v. Abram,*[12] the Court upheld a state

3. Instant case at 747.

4. The court disposed of the fifth amendment self-incrimination issue on the basis of the distinction between real evidence and testimonial evidence. MCCORMICK, EVIDENCE § 126 (1954); 8 WIGMORE, EVIDENCE § 2263 (3d ed. 1941). The question of fifth amendment due process is never reached in a federal search and seizure case since the fourth amendment standard of reasonableness is stricter than that of due process.

5. U. S. CONST. amend. IV.

6. Wolf v. Colorado, 338 U.S. 25 (1949).

7. Weeks v. United States, 232 U.S. 383 (1914). See FED. R. CRIM. P. 26.

8. Wolf v. Colorado, 338 U.S. 25 (1949). See the appendix of Justice Frankurter's opinion for the status of the *Weeks* doctrine in the several states. *Id.* at 33-39.

9. 342 U.S. 165 (1952).

10. 347 U.S. 128 (1954).

11. *Id.* at 132.

12. 352 U.S. 432 (1957).

conviction based on the results of an alcoholic blood test performed by medically approved means on an unconscious motor vehicle homicide suspect.

Whether a search of private property by federal officers is reasonable is determined by the facts and circumstances of the individual case.[13] Normally the obtaining of a warrant is a requirement, but when the search is incident to a lawful arrest the failure to obtain a warrant does not necessarily make the search unreasonable.[14] Thus, in *United States v. Rabinowitz*[15] the search of a one-room office without a search warrant, following a lawful arrest therein, was held reasonable even though there had been time for the police to procure one. The use of a stomach pump and an emetic to recover swallowed narcotics has been considered unreasonable by two district courts,[16] but the Supreme Court has not yet ruled on the reasonableness of an internal search of the body, nor has it adopted a fourth amendment standard for such searches.[17]

Although the fourth amendment does not in terms distinguish between searches of property and searches of the body, accepted notions of the

13. Rabinowitz v. United States, 339 U.S. 56 (1950), *overruling* Trupiano v. United States, 334 U.S. 699 (1948). "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case." *Id.* at 66. See Marshall, *How Far Can Federal Officers Search in Connection With an Arrest?*, 41 J. CRIM. L., C. & P.S. 325 (1950).

14. Weeks v. United States, 232 U.S. 383 (1914) (dictum). See People v. Chiagles, 237 N.Y. 193, 142 N.E. 583 (1923); MACHEN, LAW OF SEARCH AND SEIZURE 66 (1950). *Cf.* McDonald v. United States, 335 U.S. 451 (1948); Johnson v. United States, 333 U.S. 10 (1948); Harris v. United States, 331 U.S. 145 (1947); Davis v. United States, 328 U.S. 582 (1946); United States v. Leftkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

15. 339 U.S. 56 (1950).

16. United States v. Willis, 85 F. Supp. 745 (S.D. Cal. 1949); *In re* Guzzardi, 84 F. Supp. 294 (N.D. Tex. 1949). See also *The Supreme Court, 1951 Term*, 66 HARV. L. REV. 89, 122 (1952). One federal district has found such an internal search reasonable on the authority of the instant case. In United States v. Michel, 158 F. Supp. 34 (S.D. Tex. 1957), a fluoroscopic examination disclosed a foreign object in the abdomen of one of the defendants. After objection the defendant finally consented to dosages of castor oil and epsom salts and the secreted heroin was disgorged. The court did not find any coercion or brutality on the part of the officials and found that the defendant consented to the procedure throughout although there was no admission present. The court did not think it unreasonable to use a method to dislodge the heroin which the defendant himself might have employed had he not been apprehended. *Cf.* Haynes v. State, 140 Tex. Crim. 52, 143 S.W.2d 617 (1940); Ash v. State, 139 Tex. Crim. 420, 141 S.W.2d 341 (1940).

See also Application of Woods, 154 F. Supp. 932 (N.D. Cal. 1957), where the court denied an application for habeas corpus to a defendant convicted by a state court on evidence obtained in a manner practically identical to that of the instant case, stating that such methods are not a violation of the due process clause of the fourteenth amendment. *Cf.* Novak v. District of Columbia, 82 App. D.C. 95, 49 A.2d 88 (1946), *rev'd on other grounds*, 160 F.2d 588 (D.C. Cir. 1947); People v. Woods, 139 Cal. App. 2d 532, 293 P.2d 901 (1956), *cert. denied*, 352 U.S. 1006 (1957).

17. For a comprehensive history of the fourth amendment see Trimble, *Search and Seizure Under the Fourth Amendment as Interpreted by the United States Supreme Court*, 41 KY. L.J. 196, 388 (1953), 42 KY. L.J. 197, 423 (1954). See also Fraenkel, *Search and Seizure Developments in Federal Law Since 1948*, 41 IOWA L. REV. 67 (1956).

dignity of the body and its greater sanctity compared with property present the question of whether internal bodily searches should be permitted under any circumstances.[18] One position advanced is that the body is inviolate and all internal searches are therefore unreasonable.[19] It may be contended, as did the dissent in the instant case, that such a position would not necessarily compel the loss of evidence concealed in the body. It could ultimately be recovered simply by "waiting for nature to take its course." [20] This argument, however, appears impractical since in many cases such evidence will decompose within the body. If it does not, constant surveillance is necessary to prevent the suspect from himself recovering the evidence and destroying or otherwise disposing of it. Moreover, the right to habeas corpus [21] and bail [22] may make it difficult to retain custody of the suspect for a sufficient length of time. Thus, the effect of a prohibition of internal bodily search would be to place valuable evidence beyond the reach of enforcement officials. This extreme seems unnecessary, at least in those cases in which the obtaining of such evidence would entail no pain or indignity to the individual.

If some bodily invasions are to be permitted, it becomes necessary to establish a standard by which the reasonableness of a given invasion may be judged. The instant court stressed three factors upon which it based its conclusion that the search incident to the lawful arrest of the defendant was reasonable—the presence of probable cause to believe defendant had internally concealed narcotics, the absence of pain and danger incident to the search, and the gravity of the social problem presented by narcotics violations.[23] For a search of property to be reasonable when made in conjunction with a lawful arrest it is only necessary that the requirements of *Rabinowitz* be satisfied.[24] There need be no additional grounds to believe that the search will produce evidence since the courts find such a search necessary to disclose concealed weapons and fruits of the crime for which the suspect was arrested.[25] Probable cause is normally used in cases involving property searches in reference to the legality of the arrest, *i.e.*, whether there were grounds to believe that the

18. The physical abuse of the suspect appeared to be the basis on which *Irvine v. California* was distinguished from *Rochin v. California*. See also the vigorous dissents of Chief Justice Warren and Justices Douglas and Black to the police procedures which involved bodily invasion in *Breithaupt v. Abram* where the issue was one of due process and not the more restrictive standard of reasonableness. See note 19 *infra*.

19. Chief Justice Warren and Justices Douglas and Black dissenting in Breithaupt v. Abram, 352 U.S. at 440. *Cf.* United States v. Townsend, 151 F. Supp. 378 (D.D.C. 1957).

20. Instant case at 755.

21. FED. R. CRIM. P. 5(a) (suspect must be given hearing without unnecessary delay).

22. FED. R. CRIM. P. 46(1).

23. Instant case at 752.

24. See note 13 *supra*.

25. MACHEN, THE LAW OF SEARCH AND SEIZURE 66 (1950).

suspect committed the crime,[26] but in the instant case the term was also used in reference to the reasonableness of the belief that defendant had narcotics concealed internally. Here the factors determinative of whether there was probable cause, first to arrest and then to search, were substantially the same since the offense suspected was possession of narcotics. However, had the defendant been lawfully arrested for murder the factors establishing probable cause to believe that that crime had been committed would not necessarily provide grounds for believing he had concealed evidence internally. It would seem proper to require this additional showing to justify an internal bodily search since the reasons for permitting a search of property whenever there has been a lawful arrest, *i.e.,* to discover weapons and fruits of the crime for which he is arrested, are not operative. In the instant case, the court found that the inspectors had probable cause on which to make a search since they knew defendant was an addict on parole from a state drug conviction, they observed a greasy substance about his rectum, and defendant admitted that he was illegally in possession of narcotics. These facts were clearly sufficient to support a belief that a search would produce evidence of the crime.[27]

One writer has suggested that the prime consideration in determining the reasonableness of internal searches should be the pain and danger to the suspect,[28] and the instant court appears to have given this factor considerable weight.[29] However, the imposition of slight discomfort, as by a hypodermic needle, or of slight danger, as from the remote possibility of infection from a skin puncture, does not appear sufficient to justify the prohibition of all internal searches if the evidence is not otherwise obtainable[30] and the crime which is suspected is one which the public has a substantial need to detect. Yet it may be readily conceded that both due process and the requirements of reasonableness demand that the individual not be subjected to torture or extreme danger. Some limits are necessary. Pain and danger are incapable of precise measurement and these limits must of necessity be set in terms of particular factual situations. In fixing these limits the use of professional personnel to perform the search, the place where the search is conducted, and the care used to avoid unneces-

26. Brinegar v. United States, 338 U.S. 160 (1949).

27. The factors which constituted sufficient probable cause to search a moving vehicle in *Brinegar, supra* note 26, were quite analogous to those found in the instant case. The defendant had a reputation of "liquor running" and had been previously arrested for illegally transporting liquor. He had been seen by the arresting officer loading liquor into a truck or car at least twice previously. The car defendant was driving appeared heavily loaded, and he was near the border of "dry" Oklahoma coming from "wet" Joplin, Missouri, where liquor could be purchased legally. The defendant also made a voluntary admission of the possession of the liquor before the search was made, but this was not considered an essential element of the officer's probable cause. See Comment, *Requirements for Proving Probable Cause,* 29 B.U.L. REV. 540 (1949). For a collection of cases see Note, *Probable Cause in Searches and Seizures,* 3 ST. LOUIS U.L.J. 36 (1955).

28. Bachelder, *Use of Stomach Pumps as Unreasonable Search and Seizure,* 41 J. CRIM. L., C. & P.S. 189 (1951).

29. Instant case at 752.

sary pain should be considered. Some pain was obviously imposed on the suspect in the instant case. The court, however, considered this pain minor, particularly in view of the fact that much of the pain was brought about by the defendant's physical resistance. Moreover, the procedure used was a relatively simple one, involving little danger of lasting illness or disability. The court's decision to consider only the pain and danger which would have attended a search of this nature had the suspect not resisted appears proper since otherwise a premium would be placed on violent resistance.

The final factor the court considered in reaching its conclusion that the search was reasonable was the enormity of the evil presented by the illegal use and importation of narcotics. Many facts to support the court's concern over this problem are found in House[31] and Senate[32] committee hearings on illicit narcotics traffic. Other studies have shown that addiction gives impetus to crime on a nationwide scale and is increasing among the juvenile segment of the population.[33] Further, narcotics laws have been traditionally difficult to enforce;[34] border police and customs inspectors are often without the physical facilities and the funds necessary to cope with unlawful imports.[35] The court also took judicial notice of the fact that in the last two and one-half years twenty per cent of the smuggling cases in the San Diego area involved narcotics concealed in body cavities.[36] The Supreme Court has in other circumstances looked to the magnitude and difficulty of the problem facing society to determine the reasonableness of a search and seizure. In *The Appollon*[37] judicial notice was taken of the smuggler's-cove nature of a river in determining whether customs officers had probable cause to search a freighter and seize its cargo.

30. Whether a drunken driving suspect is under the influence of alcohol may be determined by breath tests or physical coordination examinations. If the degree of alcoholic content is the issue, however, this fact may be established only by a blood test, there being no alternative means of obtaining the evidence.

31. *Hearings Before the Subcommittee on the Study of Traffic in, and Control of, Narcotics, Barbiturates and Amphetamines of the House Committee on Ways and Means,* 84th Cong., 2d Sess., at 1-1633 (1956).

32. *Hearings Before the Subcommittee on the Improvements in the Federal Criminal Code of the Senate Committee on the Judiciary,* 84th Cong., 1st & 2d Sess., pts. 1-4, at 1-1301 (1957).

33. Finestone, *Narcotics and Criminality,* 22 LAW & CONTEMP. PROB. 69 (1957).

34. King, *Narcotic Drug Laws and Enforcement Policies,* 22 LAW & CONTEMP. PROB. 113 (1957). See Senate Committee on the Judiciary, *The Illicit Narcotics Traffic,* S. Rep. No. 1440, 84th Cong., 2d Sess. 3 (1955); see also Anslinger, *Narcotic Addiction as Seen by the Law-Enforcement Officer,* 21 FED. PROB. 34 (1957).

35. *The Narcotics Problem,* 1 U.C.L.A. L. REV. 405, 479-86 (1954).

36. Instant case at 752. The government's brief cited six unreported cases in which motions to suppress had been denied where search of body cavities had disclosed concealed narcotics. The government also alleged that the amount of heroin recovered from Blackford was 1.333 ounces which cost about $800 in Mexico and which could be retailed when "cut" for $25,000 in the United States. Brief for Appellee, instant case.

37. 22 U.S. (9 Wheat.) 361 (1824).

Carroll v. United States[38] developed the "moving vehicle" exception to the search warrant requirement to meet the problem of enforcing the prohibition law created by the mobile nature of automobiles. *Breithaupt v. Abram* considered highway accident and mortality rates and the interest of the community in controlling drunken driving in deciding that the taking of blood from the suspect was not a violation of due process.[39] Concededly, the presence of this factor makes a given search seem less objectionable, but it would appear likely that in all cases in which an internal search is made some pressing social problem will be present and this factor will have little independent significance in determining the reasonableness of a given search.

The greater sanctity of the body as compared to property suggests that a search warrant should be required before an internal bodily search is made even though it is performed in conjunction with a lawful arrest. Such a requirement would tend to insure that the procedure was performed in a clinical fashion by authorized personnel and would lessen the danger of abuse by overenthusiastic officers.[40] The difficulty presented in requiring a warrant at all times is the possibility of the decomposition in the body and the necessity of closely watching the prisoner until the warrant is obtained. A possible compromise would be a return in this limited area to the *Trupiano v. United States*[41] standard of requiring a warrant whenever time permits. Under such a standard a warrant would not be required where the possibility of loss of the evidence through decomposition is present. The necessity of constant surveillance of the prisoner during the interim between arrest and search would, of course, remain, but the custodial burden thus imposed does not seem too great in view of the added protection to the individual.

Corporation Law—

SHAREHOLDERS OF TWO-MAN CORPORATION HELD TO HAVE FIDUCIARY DUTY OF DISCLOSURE WHEN CONTRACTING WITH EACH OTHER FOR THE FUTURE SALE OF STOCK

The shareholders of a two-man roofing and sheet-metal corporation executed an agreement providing that upon the death of either the survivor

38. 267 U.S. 132, 160 (1925). The Court also considered the proximity of the suspects to a Canadian border area notorious for liquor smuggling.

39. 352 U.S. at 439 (1957).

40. The warrant would issue only on a sworn affidavit, where the commissioner was satisfied that there was probable cause, and would name the person to be searched and describe the property sought. FED. R. CRIM. P. 41(c). It is also conceivable that the warrant could name the medical personnel to conduct the search and the methods to be used.

41. 334 U.S. 699 (1948). The test was not whether the search incident to the lawful arrest was "reasonable under the circumstances," as in *Rabinowitz*, but whether the arresting officers had a reasonable time to procure a search warrant prior to the arrest.

was obligated to buy the deceased's stock for ten dollars per share. This price represented the value of the stock at the time of the agreement. The contract gave the parties the right to redetermine the price at the end of each fiscal year, the last price set prior to the death of either party being conclusive.[1] Drafted solely by the minority shareholder, a man thirty-three years younger and much better schooled in business and the law than his co-venturer, the agreement also contained provisions which prevented the majority shareholder from unilaterally dissolving the corporation or voting a complete disposition of the firm's assets. There was no evidence that either shareholder requested a price redetermination during the course of eight years of active association prior to the death of the majority shareholder, although by that time the book value of the stock had appreciated to approximately eighty dollars per share. The administratrix of the majority shareholder's estate requested the court to cancel the survivor-purchase agreement unless the defendant would agree to pay the appreciated book value of the stock. Contending that under the agreement any price change would require his consent and that since "it was never his intention at any time to consent to any [price] change,"[2] defendant argued that plaintiff was obligated to transfer the stock at ten dollars per share. Summary judgment for the defendant rendered by the district court was reversed on appeal, the court stating that "the holders of closely held stock in a corporation such as shown here bear a fiduciary duty to deal fairly, honestly, and openly with their fellow stockholders and to make disclosure of all essential information."[3] The court found that the failure of the minority shareholder to disclose his intent never to consent to any price change constituted a breach of this fiduciary duty which "standing alone" warranted cancellation of the agreement. The fact that the older man apparently relied upon the better trained defendant to draft the contract was given as an additional reason for holding the defendant to a duty of full disclosure.[4] *Helms v. Duckworth,* 249 F.2d 482 (D.C. Cir. 1957).

Corporate officers, directors and controlling shareholders are technically not trustees,[5] although in the administration of corporate affairs

1. The various problems in this type of agreement and some suggested answers are discussed in Currie, *Buy and Sell Agreements With Respect to Corporate and Partnership Interests,* 1950 WIS. L. REV. 12; O'Neal, *Restrictions on Transfer of Stock in Closely Held Corporation: Planning and Drafting,* 65 HARV. L. REV. 773 (1952).

2. Instant case at 486. Inasmuch as the majority shareholder was thirty-three years older than the minority shareholder, it was in the interest of the defendant to keep the price low.

3. Instant case at 487.

4. The decision also could have been placed on contract grounds since under contract law a promise made without the intent to perform it constitutes fraud and renders the agreement voidable. RESTATEMENT, CONTRACTS §§ 473, 476 (1932). Similar agreements have withstood the challenge that they are testamentary in character and therefore void for failure to comply with the statutory requirements governing wills. *E.g.,* Chase Nat'l Bank v. Manufacturers Trust Co., 265 App. Div. 406, 39 N.Y.S.2d 370 (1st Dep't 1943).

5. Title to corporate property is vested in the artificial entity known as the corporation. See 1 BOGERT, TRUSTS AND TRUSTEES § 16 (1951).

and with respect to the corporation and the shareholders as a body they stand in a relationship analogous to that of trustee and beneficiary.[6] Thus, such acts as an officer-director casting the determining vote to increase his salary as an officer,[7] controlling shareholders instituting a statutory dissolution of a lucrative corporation for the purpose of acquiring complete control of the corporation's business,[8] and controlling shareholders selling their shares and immediately resigning their positions as officers in order to leave the corporation's negotiable assets at the mercy of the purchasers[9] have been held by the courts to constitute a breach of fiduciary duty. However, the majority view of the courts is that no fiduciary relationship exists between corporate officials or controlling shareholders and other shareholders when the parties are buying and selling shares between themselves.[10] Thus, where officials have purchased outstanding stock without disclosing facts material to the value of the stock, most courts have held that the official is not liable to the shareholders for profits from the transaction.[11] One of these courts has felt it impractical to impose a duty of disclosure of true stock values upon a corporate official who purchases in the open market,[12] while another has reasoned that, since corporate officials do not have the control over the shareholder's property interest in his stock that they exercise over the corporation's assets, the analogy to the relationship of trustee and beneficiary is inappropriate.[13] Implicit in these holdings is the recognition that in the traditional corporation there is a separation of management from ownership. In such a business there is absent the close relationship between the corporate official or controlling shareholder and minority shareholder that breeds a fiduciary duty.[14] But where the corporation differs from the traditional, and the relationship between the parties becomes more intimate, the courts have realized that the application of the majority rule works harsh results. Thus, an exception to the rule was made in the leading case of *Strong v. Repide*.[15] There the Supreme Court announced its "special facts" doctrine, under which the court examines the particular relationship between the corporate official

6. 3 FLETCHER, CYCLOPEDIA CORPORATIONS § 838 (perm. ed. 1947); 13 *id.* § 5811 (perm. ed. 1943), and cases collected therein.

7. Schaffhauser v. Arnholt & Schafer Brewing Co., 218 Pa. 298, 67 Atl. 417 (1907).

8. Kavanaugh v. Kavanaugh Knitting Co., 226 N.Y. 185, 123 N.E. 148 (1919).

9. Gerdes v. Reynolds, 30 N.Y.S.2d 622 (Sup. Ct. 1941).

10. Board of Comm'rs v. Reynolds, 44 Ind. 509 (1873); Cromwell v. Jackson, 53 N.J.L. 656, 23 Atl. 426 (Ct. Err. & App. 1891). See also Chenery Corp. v. SEC, 128 F.2d 303 (D.C. Cir. 1942); Dunnett v. Arn, 71 F.2d 912 (10th Cir. 1934); Gardner v. Baldi, 24 N.J. Super. 228, 93 A.2d 644 (Ch. 1952). *Contra,* Oliver v. Oliver, 118 Ga. 362, 45 S.E. 232 (1903).

11. *Ibid.*

12. Goodwin v. Agassiz, 283 Mass. 358, 186 N.E. 659 (1933).

13. Board of Comm'rs v. Reynolds, 44 Ind. 509 (1873).

14. See Leech, *Transactions in Corporate Control,* 104 U. PA. L. REV. 725, 746-47 (1956). See also text at notes 20-21 *infra.*

15. 213 U.S. 419 (1909).

and the shareholder to see if there are special circumstances which require a fiduciary duty to make disclosure of material facts bearing upon a sale of stock between the two.[16] In *Strong* the Court was presented with a small "paper" corporation formed for the specific purpose of selling the land which was its sole asset. The Court held that the majority shareholder, who was also a director and the chief negotiator with prospective purchasers, had breached his fiduciary duty by failing to disclose to the minority shareholder whose stock he had purchased that pending negotiations had multiplied the value of the stock almost tenfold. Many courts following the *Strong* approach have considered the particular distribution of the ownership of the stock of the corporation involved as one of the "special facts" operative in their conclusion that a fiduciary relationship of disclosure existed between a corporate official and the complaining shareholder;[17] but none has gone as far as the instant court did in ruling that a shareholder incurs a fiduciary obligation to disclose information relating to the true stock value solely on the basis of his membership in a close corporation.

The instant court felt that to apply the majority view would be to ignore the practical distinctions between the close and the open corporation.[18] Thus, the court stated that since in the close corporation there is an "absence of a division between the stockholder-owners and the director-managers,"[19] the business venture is more aptly termed an "incorporated partnership." Rules similar to those which govern the relationship between partners were therefore held to govern the instant case.[20] One of the essential features of small businesses, the trust and confidence that the co-venturers in the business must place in each other to maintain a smooth running business, does not depend upon the legal categorization of the business association as a partnership or a corporation. Therefore, the court's decision to ignore the corporate entity and impose upon the shareholders a partnership-type standard of conduct seems correct. This decision gives to shareholders in the close corporation both a standard of disclosure with which the business associates may gauge their conduct when buying and selling stock, and a tool which the courts may use to insure that any

16. See Smith, *Purchase of Shares of a Corporation by a Director From a Shareholder*, 19 MICH. L. REV. 698 (1921), for an analysis of "special facts" cases.

17. George v. Ford, 36 App. D.C. 315 (1911) (two-man lumber corporation); Taylor v. Wright, 69 Cal. App. 2d 371, 159 P.2d 980 (1940) (small group of investors in investment corporation); Northern Trust Co. v. Essaness Theatres Corp., 348 Ill. App. 134, 108 N.E.2d 493 (1952) (three-man movie theater corporation).

18. Writers have long advocated the judicial recognition of these distinctions. See Hornstein, *Judicial Tolerance of the Incorporated Partnership*, 18 LAW & CONTEMP. PROB. 435 (1953); Israels, *The Sacred Cow of Corporate Existence*, 19 U. CHI. L. REV. 778 (1952); Winer, *Proposing a New York "Close Corporation Law"* 28 CORNELL L.Q. 313 (1943); Note, 71 HARV. L. REV. 1498 (1958).

19. Instant case at 486.

20. When purchasing a co-partner's interests, a partner has a duty to disclose facts bearing on the transaction which are not open to the other partner. Brooks v. Martin, 69 U.S. (2 Wall.) 70 (1863); Caldwell v. Davis, 10 Colo. 481, 15 Pac. 696 (1887); Poss v. Gottleib, 118 Misc. 318, 193 N.Y. Supp. 418 (Sup. Ct. App. T. 1922); Guggenheim v. Guggenheim, 95 Misc. 332, 159 N.Y. Supp. 333 (Sup. Ct. 1916).

trust in fact placed by one co-venturer in another is not misused. In the latter respect the rule of the instant case will be particularly useful in aiding the courts to deal with stock-purchase agreements. These agreements are extremely common among the owners of close corporations.[21] Often very complex, the typical agreement includes either a mandatory sale-and-purchase provision or an option to buy the corporation's stock at the death or retirement of a stockholder, or when a stockholder wishes to dispose of his stock.[22] These agreements arise out of the desire of the incorporating shareholders to preserve the power to choose their future business associates or keep the ownership of the corporation's stock among themselves. In addition, each shareholder wishes to secure a guaranteed price for his stock in the event of his death or retirement from the business.[23] Part of the past judicial reluctance[24] to give complete effect to several types of these contracts may well have been based upon a concern that the contracts might serve as an incentive to force a shareholder to retire, or be discharged, or that the purchase option would be exercised only when the stock was of an unusual value.[25] To prevent seemingly unconscionable results from arising out of these contracts the courts either have strained property[26] or contract[27] principles, or resorted to

21. See Cataldo, *Stock Transfer Restrictions and the Closed Corporation*, 37 VA. L. REV. 229 (1951); O'Neal, *Restrictions on Transfer of Stock in Closely Held Corporation: Planning and Drafting*, 65 HARV. L. REV. 773 (1952).

22. O'Neal, *supra* note 21, at 773-74.

23. In the close corporation the shareholders often take their income in the form of salaries as management; dividends are often non-existent. Unless a purchaser is assured of a managerial position, either by stipulation or by purchase of control, to him the shares are practically worthless. Therefore, unlike the case of large corporations where the stock is traded over-the-counter or on an exchange, there is seldom a ready market for the shares of a small closely held corporation other than the other shareholders. See O'Neal, *supra* note 21, at 774.

24. See generally Cataldo, *supra* note 21; Currie, *Buy and Sell Agreements With Respect to Corporate and Partnership Interests*, 1950 WIS. L. REV. 12; O'Neal, *supra* note 21.

25. In Greene v. E. H. Rollins & Sons, Inc., 22 Del. Ch. 394, 2 A.2d 249 (Ch. 1938), an option given to the corporation by its charter to purchase shares of holders whenever it felt the purchase was necessary to insure the harmonious conduct of the business was held to be an unreasonable restraint on the alienation of the shares. In discussing the restraint the court said: "Asset values fluctuate from day to day, not to say from year to year. By discreet selection of the times to buy, the directors would have the stockholders at their mercy, and by the same token no stockholder would ever be reasonably sure of his investment." *Id.* at 403, 2 A.2d at 253. In Palmer v. Chamberlin, 191 F.2d 532 (5th Cir. 1951), the court held valid an option agreement under which the directors of the corporation were given first option to purchase stock at the then book value of the stock if a holder wished to sell his shares or if a shareholder died or ceased to be connected with the corporation. The dissent argued that under these provisions the present directors, through favoritism in choosing to exercise their options or not, could perpetuate themselves in office.

26. *Cf.* Victor J. Bloede Co. v. Bloede, 84 Md. 129, 34 Atl. 1127 (1896); Ireland v. Globe Milling Co., 21 R.I. 9, 41 Atl. 258 (1898).

27. *Cf.* Topken, Loring & Swartz, Inc. v. Schwartz, 249 N.Y. 206, 163 N.E. 735 (1928), where the court held that a promise by the corporation to purchase the shares of a holder upon termination of employment was illusory on the rationale that the corporation might not have the funds available from which it could legally purchase the shares at that time.

"public policy"[28] grounds. The instant decision will allow courts to oversee these agreements in the light of a more flexible standard. Until adequate legislation provides some type of arrangement whereby these peculiar needs of the close corporation are satisfied, such a result is satisfactory.

Not all stock dealings in close corporations, however, would seem to require a duty of disclosure different from that required in open corporations. For example, where some of a close corporation's shares sold or purchased are owned by a professional investor who does not participate in the corporation's management, or where the shares are held by an employee who has been given a few shares to insure his continued loyalty to the corporation, there would seem to be no reason to employ a different standard than that applied to open corporations. The relationship of the investor to the corporation's management, or the employee to his employer, would not seem to differ merely because the stock of the corporation with which they were associated was widely or narrowly held, or freely traded or restricted in its market. It is likely, therefore, that future courts using the rule of the instant case will not extend its application beyond situations involving manager-shareholders dealing with each other.

Criminal Law—

KILLING OF FELON BY POLICE OFFICER DURING PERPETRATION OF ROBBERY DOES NOT MAKE CO-FELON CRIMINALLY RESPONSIBLE UNDER PENNSYLVANIA FELONY-MURDER RULE

Upon leaving a restaurant where they had committed armed robbery, defendant and an accomplice were confronted by police officers. Defendant opened fire, and, in the ensuing gun battle, defendant's accomplice was fatally wounded by bullets fired by the police. Defendant was convicted of murder in the first degree and sentenced to life imprisonment. The Supreme Court of Pennsylvania reversed, holding that, since the killing of the co-felon was justifiable homicide, defendant could not be guilty of murder. *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958).

In determining the criminal responsibility of a felon for the lethal acts of someone other than himself which occur during the commission of a felony, two theories have been operative.[1] Under the agency theory, the

28. *E.g.*, Greene v. E. H. Rollins & Sons, Inc., 22 Del. Ch. 394, 2 A.2d 249 (Ch. 1938).

1. See generally Hitchler, *The Killer and His Victim in Felony Murder Cases*, 53 DICK. L. REV. 3 (1948); Ludwig, *Foreseeable Death in Felony Murder*, 18 U. PITT. L. REV. 51 (1956); Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50 (1956); Note, *Recent Extensions of the Felony Murder Rule*, 31 IND. L.J. 534 (1956); Note, *A Survey of Felony Murder*, 28 TEMP. L.Q. 453 (1953).

felon is responsible only for those killings perpetrated by a co-felon.[2] The act of killing is imputed to the felon by the existence of the consipracy in furtherance of which the killing is perpetrated.[3] One exception to this theory exists in the so-called "shield" [4] and "alternate danger" [5] cases, in which it is held that the fact that the felon either uses his victim as a breastwork or uses him to do some act in the furtherance of the felony by which the victim is placed in a dangerous position is sufficient to impute the act of killing to the felon. These cases appear to be the seed of the proximate cause theory, which requires only that the death be a natural or reasonably forseeable result of the felon's acts.[6] The agency theory was generally followed in the United States [7] until the recent case of *Commonwealth v. Moyer*,[8] in which the Supreme Court of Pennsylvania stated that a murder conviction of a person perpetrating a holdup was proper even though the shots which killed the victims may have been fired by another victim, rather than by one of the felons.[9] Although it was not clear whether the court's statement in the *Moyer* case was holding or dictum,[10] this temporary confusion was clarified by *Commonwealth v. Almeida*,[11] in which a conviction for the murder of a policeman during the commission of a robbery was affirmed even though the fatal shots were fired by another policeman, the court reasoning that the commission of the felony was the proximate cause of the killing.[12] The proximate cause theory was extended in *Commonwealth v. Thomas* [13] to the killing of a co-felon by the victim

2. *E.g.*, Butler v. People, 125 Ill. 641, 18 N.E. 338 (1888); Commonwealth v. Moore, 121 Ky. 97, 88 S.W. 1085 (1905); Commonwealth v. Campbell, 89 Mass. (7 Allen) 541 (1863); State v. Majors, 237 S.W. 486 (Mo. 1922) (*semble*); State v. Oxendine, 187 N.C. 658, 122 S.E. 568 (1924); *cf.* People v. Garippo, 292 Ill. 293, 127 N.E. 75 (1920); People v. Udwin, 254 N.Y. 255, 172 N.E. 489 (1930).

3. Commonwealth v. Lowry, 374 Pa. 594, 98 A.2d 733 (1953).

4. Wilson v. State, 188 Ark. 846, 68 S.W.2d 100 (1934).

5. Keaton v. State, 41 Tex. Crim. 621, 57 S.W. 1125 (1900); Taylor v. State, 41 Tex. Crim. 564, 55 S.W. 961 (1900).

6. Commonwealth v. Moyer, 357 Pa. 181, 192-93, 53 A.2d 736, 742 (1947).

7. The only exception to the denial of responsibility where the lethal act was committed by someone other than one of the felons prior to 1947 was People v. Payne, 359 Ill. 246, 194 N.E. 539 (1935).

8. 357 Pa. 181, 53 A.2d 736 (1947).

9. The court, at least by implication, had approved the "agency or furtherance of the felonious design" formula prior to the *Moyer* case. Commonwealth v. Thompson, 321 Pa. 327, 184 Atl. 97 (1936); Commonwealth v. Mellor, 294 Pa. 339, 144 Atl. 534 (1928); *cf.* Commonwealth v. Lessner, 274 Pa. 108, 118 Atl. 24 (1922).

10. The statement of the court has been cited as holding, instant case at 522, 137 A.2d at 487 (dissenting opinion), dictum, *id.* at 504, 137 A.2d at 480, and authority, Commonwealth v. Almeida, 362 Pa. 596, 603, 68 A.2d 595, 599 (1949).

11. 362 Pa. 596, 68 A.2d 595 (1949).

12. Lower court applications of the *Almeida* rule have found the principles used where the charge was aggravated assault and battery, Commonwealth v. Wheatley, 89 Pa. D.&C. 261 (Q.S. 1954), and suggested as pertinent where a new trial *nunc pro tunc* was granted, because of newly discovered evidence, to a murder suspect for a crime allegedly committed in 1926. Commonwealth v. Harris, 1 Pa. D. & C.2d 143, 151 (Ct. Oyer & Ter. 1954).

13. 382 Pa. 639, 117 A.2d 204 (1955).

during the flight following a robbery, and in *Commonwealth v. Bolish*[14] to the accidental death of a co-felon who, through his own negligence, was trapped by fire during the commission of arson. The courts of several other states have adopted the rule established in the *Almeida* case.[15]

To decide as it did in the instant case, the court was compelled to overrule the *Thomas* decision.[16] In so doing, however, it declined to overrule *Almeida,* although it could easily have done so by repudiating the proximate cause test. *Almeida* was distinguished on the basis that in that case the homicide was merely excusable, while in *Thomas* and the instant case it was justifiable.[17] Such a distinction seems unsupportable. If criminal responsibility of a felon is to be based on the tendency of his felonious act to cause death, it should make no difference whether the person killed is a co-felon, victim, policeman, or bystander.[18] Indeed, if there is any greater likelihood that the felony will result in the death of one of these persons, it falls upon the co-felon. Nor can the distinction be supported on the ground of its deterrent value. If the purpose of the felony-murder rule is to deter the commission of the felony itself, the maximum deterrence is supplied by holding the felon responsible in both the *Almeida* and *Thomas* situations. If the purpose is merely to deter the use of lethal weapons, whether the purpose is furthered by holding the felon responsible for the acts of third persons involves the question of whether, in his eyes, the increased likelihood of death when weapons are used is offset by the increased likelihood of success and escape. Depending on the answer to this question, maximum deterrence is supplied by holding the felon responsible in both or in neither case. Finally, if the rationale of the instant decision is the conceptualistic one that the act of killing itself was not unlawful and therefore cannot be murder, the rationale applies equally to the *Almeida* situation where the homicide was excusable.[19]

Commonwealth v. Thomas and the Pennsylvania extensions of the felony-murder rule have been widely criticized on the grounds that they violate "basic fairness," [20] reverse a trend toward narrowing the rule be-

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14. 381 Pa. 500, 113 A.2d 464 (1955). *Contra,* People v. Ferlin, 203 Cal. 587, 265 Pac. 230 (1928).

15. People v. Wilburn, 314 P.2d 590 (Cal. App. 1957); Hornbeck v. State, 77 So. 2d 876 (Fla. 1955) (dictum); People v. Podolski, 332 Mich. 508, 52 N.W.2d 201 (1952); *cf.* Hinrichs v. First Judicial Dist. Court, 71 Nev. 168, 283 P.2d 614 (1955).

16. Instant case at 489, 137 A.2d at 473.

17. *Id.* at 510, 137 A.2d at 483. "Under the older common law a homicide was justifiable where the person committing it killed in strict performance of a legal duty; and it was excusable where it was committed accidentally or in self-defense." MILLER, CRIMINAL LAW § 83 (1934).

18. See Morris, *supra* note 1, at 56.

19. "Sir Edward Coke said that anciently excusable homicide was punished by death; but this is probably not true. It was certainly punished, however, by forfeiture of goods and chattels. Now it is no longer punished at all, either in England or in the United States." CLARK & MARSHALL, CRIMES § 274 (5th ed. 1952).

20. Schultz, *Criminal Law and Procedure,* in *1955-56 Survey of Pennsylvania Law,* 18 U. PITT. L. REV. 216, 221 (1957).

cause of its ineptness in punishing culpability,[21] are contrary to the *sub silentio* precedent of centuries,[22] mingle tort causation principles with criminal sanctions without an effort to weigh the policy considerations involved,[23] and invade the traditional province of the legislature in determining criminal policy.[24] The deterrent value of the extensions has also been seriously questioned.[25] While these objections constitute a convincing argument for overruling the *Almeida-Thomas* rule, it is questionable whether a partial revocation of that rule is sufficiently desirable to justify the distinction drawn in the instant case.

It is possible, however, to read the instant decision as an implied repudiation of the proximate cause theory. Such a reading seems particularly tenable in light of the court's decision on the second *Bolish* case,[26] decided the same day. In the original case, the court held that defendant could be tried for murder on the ground that the felony was the proximate cause of the co-felon's death, but granted a new trial because of the use of inadmissible evidence.[27] In the second case, the murder conviction was affirmed, but this time on the ground that the lethal act was committed by a co-felon in furtherance of the felony.[28] This failure of the court to again rest its decision on proximate cause principles may be significant and, together with the instant case, may well foreshadow an ultimate overruling of *Almeida* and a return to the agency theory of criminal responsibility.[29]

21. See Note, *Felony Murder as a First Degree Offense: An Anachronism Retained,* 66 YALE L.J. 427 (1957).

22. See Morris, *supra* note 1, at 68.

23. See Ludwig, *Foreseeable Death in Felony Murder,* 18 U. PITT. L. REV. 51 (1956); Ryu, *Causation in Criminal Law,* 106 U. PA. L. REV. 773, 803 (1958). See also Crum, *Causal Relations and the Felony Murder Rule,* 1952 WASH. U.L.Q. 191.

24. Schultz, *supra* note 20, at 224-25.

25. Morris, *supra* note 1, at 67.

26. Commonwealth v. Bolish, 391 Pa. 550, 138 A.2d 447 (1958).

27. 381 Pa. 500, 113 A.2d 464 (1955).

28. Commonwealth v. Bolish, 391 Pa. 550, 553, 138 A.2d 447, 449 (1958).

29. Chief Justice Jones admitted that the distinction between justifiable and excusable homicide is more "incidental than legally significant" but said, "[S]uch distinction serves the useful purpose of thwarting further extension of the rule enunciated in Commonwealth v. Almeida. . . ." and continued that "it will be time enough for action in such regard [a reconsideration of *Almeida*] if and when a conviction for murder based on facts similar to those presented by the Almeida case should again come before the court." Instant case, 137 A.2d at 483.